IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

FILED
JUN 14
MICHAEL RODAK

No. 72-1693

CLIFTON L. BRIGHAM and JANE G. BRIGHAM,
Petitioners,

vs.

THE UNITED STATES,
Respondent.

JEROME G. GAGE and SHIRLEY K. GAGE,
Petitioners,

vs.

THE UNITED STATES,
Respondent.

RALPH H. GAGE, INDIVIDUALLY, and RALPH H. GAGE and JEROME D. GAGE, EXECUTORS OF THE ESTATE OF NELL D. GAGE,
Petitioners,

vs.

THE UNITED STATES,
Respondent.

CHARLES F. JARRARD and MARGARET B. JARRARD,
Petitioners,

vs.

THE UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

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June 12, 1973.

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INDEX.

	PAGE
Opinion Below	2
Jurisdiction	2
Questions Presented	2
Statutory Provisions Involved	3
Statement of the Case	3
Reasons for Granting the Writ	6
Conclusion	10
Appendix	App. 1

CITATIONS.

Cases.

Bull v. United States, 295 U. S. 247 (1935) 7

Commissioner of Internal Revenue Service v. Brown, 380 U. S. 563 (1965) 6

Gant v. United States, 441 F. 2d 1130 (C. A. 5th 1971) 5, 6, 7

Heineman v. United States, 391 F. 2d 648 (Ct. Cl. 1968) 7

Oklahoma Gas and Electric v. United States, 72-2 USTC ¶ 9638 ..... 5, 6, 7

Rothensies v. The Electric Storage Battery Co., 329 U. S. 296 (1946) 7

United States v. Rachal, 312 F. 2d 376 (C. A. 5th 1962) 5, 6, 7

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

The above-styled Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Claims entered in this proceeding on December 12, 1972.

OPINION BELOW.

The opinion of the Court of Claims, not yet reported, appears in the Appendix hereto.

JURISDICTION.

The judgment of the Court of Claims was entered on December 12, 1972. A timely motion for rehearing or reconsideration was denied on March 16, 1973, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U. S. C. § 1255.

QUESTIONS PRESENTED.

(1) Whether the provisions of Section 1311 through 1315 of the Internal Revenue Code of 1954 apply in mitigation of the otherwise applicable statute of limitations on refunds with respect to Petitioners' taxable years 1958, 1959, 1960, and 1961.

(2) Whether, assuming the provisions of the mitigation sections are inapplicable, Petitioners are equitably entitled to recoup the taxes paid for the taxable years 1958 through 1961, inclusive.

(3) Whether the examination of Petitioners' federal income tax returns for 1962 and the actions in conjunction with said examination taken by the Commissioner of Internal Revenue, as well as the Commissioner's ultimate resolution of the issues, effectively notified the Commissioner so as to constitute timely claims for refund for the taxable years 1958 through 1961, inclusive, within the meaning of Section 6511 of the Internal Revenue Code of 1954.

STATUTORY PROVISIONS INVOLVED.

The pertinent statutes are set out in the Appendix A, *infra.*

STATEMENT OF THE CASE.

The facts as stated by the United States Court of Claims, may be summarized as follows:

In 1952, the shareholders of Gage Structural Steel Corporation and Midland Structural Steel Corporation, which included the Petitioners in the instant case, sold their stock in an installment sale. In 1957, the stock was repurchased by a similar group of shareholders, which included the instant Petitioners. From 1952 to 1957 Petitioners reported the proceeds from this sale as capital gains and on the installment basis for federal income tax purposes. This consistent means of reporting was accepted by the Internal Revenue Service.

However, beginning with the year 1958, the Internal Revenue Service reversed its position and determined that the proceeds from the sale should be reported as ordinary income rather than capital gain. The returns filed by each of the above-named Petitioners were examined for the years 1958 through 1961, inclusive. A deficiency was assessed and paid by each of Petitioners. Although the answer filed by the United States contests the payment date, the Court of Claims found that payment was made during the period March 1, 1963 to June 4, 1963.

The tax return of Petitioners Jerome D. and Shirley K. Gage for the year 1962 was audited ". . . during the years 1965 and 1966 . . ." and again a finding was made that the proceeds from the sale of Gage stock constituted ordinary income. These Petitioners filed a protest to that finding and received a refund of $941.96. The refund constituted a concession by the Commissioner that the proceeds of the installment sale received during 1962 were to be treated as capital gain and not ordinary income.

However, the basis for this concession was not part of the record before the Court of Claims, nor had it ever been supplied by the government to Petitioners.

At approximately the same time, the 1962 federal income tax return of Ralph H. and Nell D. Gage was also examined. Again, the finding was initially made that the proceeds from the sale of their Gage stock constituted ordinary income. After Petitioners filed a protest to this finding, the Internal Revenue Service informed them by a letter of June 27, 1967, that no deficiency would be asserted for the year 1962. The Internal Revenue Service, as in the case of the 1962 year of Jerome and Shirley Gage, had reversed its stance. The Court of Claims found that the Service had ". . . conceded that a legitimate sale had occurred and that the proceeds of the sale of the Gage stock were subject to capital gain treatment." See Slip Op. p. 3 Appendix C. There is no basis in the record for this finding.

On June 17, 1968, within one year after the refund was granted to Jerome and Shirley Gage (and within one year after the above-described letter was sent to Ralph and the Estate of Nell Gage), all four groups of Petitioners filed claims for refund for the years 1958, 1959, 1960 and 1961 to recover the amounts of additional taxes and interest which they had paid. All of these claims were based on properly treating the monies the taxpayers had received from their sales of Gage stock as capital gains. All the claims were disallowed. The claims of Clifton L. and Jane G. Brigham were disallowed on December 9, 1968; and the claims of all the other taxpayers were disallowed on August 19, 1968.

Timely suits for the refund of the taxes set forth in the Claims for Refund were instituted by the four groups of Petitioners.[1] The Petitioners assert that they are entitled to recover the amounts which are specified in the aforementioned claims for refund, together with interest thereon, based upon the correct tax treatment of the Gage stock sale proceeds for the taxable years 1958 through 1961. The government defends the suit on the basis that the claims for refund were barred by the Statute of Limitations set forth in Section 6511 of the Internal Revenue Code of 1954 and the provisions of Sections 1311 to 1315, inclusive, which attempt to mitigate the impact of the Statute of Limitations are inapplicable. Respondent further contends that equitable recoupment is inapplicable in the instant case and the actions with respect to 1962 may not be viewed as putting the Commissioner on notice sufficient to constitute a Claim for Refund for the years 1958 through 1961, inclusive.

---

1. No. 281-70: Clifton L. and Jane G. Brigham

1958:	$ 1,304.63
1959:	2,424.63
1960:	629.43
1961:	2,008.19

No. 282-70: Jerome D. and Shirley K. Gage

1958:	$ 4,356.77
1959:	6,974.58
1960:	1,498.88
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No. 283-70: Ralph H. and Nell D. Gage

1958:	$38,150.57
1959:	62,917.55
1960:	5,572.00
1961:	19,932.62

No. 284-70: Charles F. and Margaret B. Jarrard

1958:	$34,847.26
1959:	65,547.28
1960:	8,323.08
1961:	18,536.45

The cases were consolidated by Court Order (Slip Op. pp. 1-2, Appendix C) .

Respondent's Motion for Judgment on the Pleadings was granted on December 12, 1972 (Appendix C). Petitioners' Motion for Rehearing or Reconsideration was denied on March 16, 1973. (Appendix B)

Whereupon, this Petition for a Writ of Certiorari is respectfully submitted.

REASONS FOR GRANTING THE WRIT.

1.

The Decision Below Conflicts with the Decisions of Courts of Appeal as to the Proper Interpretation of 26 U. S. C. §§ 1311-1315, Inclusive.

The decision below is in conflict with the Fifth Circuit opinions in *United States* v. *Rachal,* 312 F. 2d 376 (1962) and *Gant* v. *United States,* 441 F. 2d 1130 (1971). It further conflicts with the Tenth Circuit decision in *Oklahoma Gas and Electric* v. *United States,* 72-2 USTC ¶ 9638.

In 1967, the Commissioner of Internal Revenue corrected his error and treated the proceeds received in 1962 from the 1952 installment sale of stock as capital gain rather than ordinary income. In 1968, within one year of this change of position, all four groups of Petitioners filed claims for refund for taxes paid by them on or before June 4, 1963 for the years 1958, 1959, 1960 and 1961. These claims were with respect to taxes paid on proceeds from the same installment sale as was involved in the 1962 year.

The substantive grounds for the Claims for Refund filed for the taxable years 1958 through 1961 were clearly proper as recognized by the Commissioner in his determination for 1962. However, the Claims were not filed within the time prescribed by Section 6511, Internal Revenue Code of 1954. The Internal Revenue Code nevertheless authorizes consideration of the Claims if they come within the provisions of Section 1311 through 1315, of the Internal Revenue Code of 1954, inclusive.

As the Court of Claims recognized (Slip Op., p. 5, Appendix C) the application of these provisions, commonly referred to as the "mitigation sections," requires the following:

1) a determination
2) which adopts a position maintained by (in this case) the Commissioner (In the present case, since the Commissioner is the beneficiary of the statutory bar, it is his maintenance of the inconsistent position which must be shown. Section 1311(b)(1)(A);
3) and that position is inconsistent with the prior treatment of the item in question;
4) which brings about an unfair result described in one of the paragraphs of section 1312.

As to Jerome D. and Shirley K. Gage, the Court stated (Slip Op., pp. 5-6 Appendix C):

> "The parties have assumed that the following prerequisites to relief under the mitigation provisions have been fulfilled: (1) a 'determination' within the meaning of section 1313 has been made; (2) the position adopted by the determination is inconsistent with the erroneous tax treatment of the transaction in a previous taxable year; and (3) the determination is described in section 1312(7) of the Internal Revenue Code of 1954.
>
> The crucial issue is whether the Commissioner of Internal Revenue has *actively maintained* a position with regard to the 1962 determination which is inconsistent with the erroneous inclusion or recognition."

Thus, the Court of Claims recognized the mitigation provisions *would apply* if it could be proven that the Commissioner had "maintained" a position which was inconsistent with the prior treatment of the item in question.[2] Without permitting an opportunity for the Petitioners to develop the facts which

2. The Court of Claims indicates that the claims of the remaining three sets of Petitioners, to wit: Ralph H. Gage and Estate of Nell D. Gage, Clifton L. Brigham and Jane G. Brigham, and Charles F. Jarrard and Margaret B. Jarrard, may be disposed of on the same grounds.

prompted the Commissioner's change, and merely from a review of the Pleadings, the Court states, "The reason for this changed stance by the Internal Revenue Service is clear." The Court concludes that the change in the government's position resulted in the instant cases from the issuance of Rev. Rul. 66-153, 1966-1 Cum. Bull. 187, which was issued after the United States Supreme Court decision in *Commissioner of Internal Revenue* v. *Brown*, 380 U. S. 563 (1965). Accordingly, the Court concludes the Commissioner had not "actively maintained" an inconsistent position. (See Slip Op. pp. 3-4, Appendix C)

Assuming the validity of the Court of Claims' obviously premature factual conclusion,[3] it is respectfully submitted that the Court's determination that the Commissioner had not "maintained" an inconsistent position is contrary to the law developed by the United States Court of Appeals for the Fifth Circuit in *United States* v. *Rachal*, 312 F. 2d 376 (1962) and *Gant* v. *United States*, 441 F. 2d 1130 (1971). Moreover, it conflicts with the law as accepted by the United States Court of Appeals for the Tenth Circuit in *Oklahoma Gas and Electric* v. *United States*, 72-2 USTC ¶ 9638.

The Commissioner's change of position in the instant case is clearly analogous to the Commissioner's change in the computation of the taxpayer's ending inventory in *Rachal, supra*. The mere fact that Petitioners discovered the Commissioner's error, rather than the Commissioner, and brought it to the Commissioner's attention does not preclude the applicability of the mitigation provisions. *Gant, supra*. Moreover, the instant case, which involves an installment sale, unlike the decision relied upon by the Court of Claims of *Heineman* v. *United States*, 391

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3. The Court of Claims' refusal to afford the Petitioners an opportunity to adequately develop the facts surrounding the Commissioner's change in position further justifies a review of this summary decision.

F. 2d 648 (Ct. Cl. 1968), involves returns for related years. In effect, the change in the Commissioner's position was affirmatively recognized by the Commissioner as was the Commissioner's counterclaim in *Oklahoma Gas, supra,* which resulted in application of the mitigation provisions.

2.

The Decision Below Involves Questions of Federal Law Which Have Not Been, but Should Be, Settled by This Court.

(a) The United States Court of Claims has interpreted the doctrine of equitable recoupment as stated by this Court in *Bull* v. *United States,* 295 U. S. 247 (1935) as inapplicable to the instant case.

The sums received were originally correctly reported as ordinary income by the Petitioners on their individual income tax returns. The Commissioner erroneously determined these amounts should be taxed as capital gain. The monies were erroneously paid under protest, by reason of the incorrect determination by the Commissioner. Accordingly, if relief is not otherwise available, it is submitted the circumstances of the instant case justify the application of the equitable recoupment doctrine. The error here is clearly that of the Commissioner, and Petitioners should obviously be compensated.

Equitable recoupment is applicable in a situation involving a transaction running over a period of many years with respect to single group of taxpayers. See *Rothensies* v. *The Electric Storage Battery Co.,* 329 U. S. 296 (1946). Refusal to recognize equitable recoupment in the instant case results in a denial to the Petitioners of a recovery of monies paid to the government by reason of the erroneous interpretation of the Commissioner which in later years was revoked with respect to the *same* taxpayers and that *same* transaction.

(b) Yet another question of federal law which has not been settled by this Court involves the formalistic requirement imposed by the United States Court of Claims with respect to the recognition of a valid Claim for Refund. The Court below determined that a written notice of a claim for refund must be filed with the Commissioner in order to place him on timely notice of Petitioners' claim with respect to earlier years. Certainly, in the instant case where the Commissioner's change in position affected a continuous method of reporting income, it was incumbent upon the Commissioner to correct his earlier errors. The Commissioner's actions with respect to 1962 must be interpreted as acknowledging existence of claims for the years 1958 through 1961. Accordingly, the Court of Claims erred by not recognizing the existence of valid Claims with respect to these earlier years.

CONCLUSION.

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Claims.

Respectfully submitted,

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APPENDIX A.

Internal Revenue Code of 1954 (26 U. S. C.).

SEC. 1311. CORRECTION OF ERROR.

(a) *General Rule.*—If a determination (as defined in section 1313) is described in one or more of the paragraphs of section 1312 and, on the date of the determination, correction of the effect of the error referred to in the applicable paragraph of section 1312 is prevented by the operation of any law or rule of law, other than this part and other than section 7122 (relating to compromises), then the effect of the error shall be corrected by an adjustment made in the amount and in the manner specified in section 1314.

(b) *Conditions Necessary for Adjustment.*—

(1) *Maintenance of an inconsistent position.*—Except in cases described in paragraphs (3)(B) and (4) of section 1312, an adjustment shall be made under this part only if—

(A) in case the amount of the adjustment would be credited or refunded in the same manner as an overpayment under section 1314, there is adopted in the determination a position maintained by the Secretary or his delegate, or

(B) in case the amount of the adjustment would be assessed and collected in the same manner as a deficiency under section 1314, there is adopted in the determination a position maintained by the taxpayer with respect to whom the determination is made,

and the position maintained by the Secretary or his delegate in the case described in subparagraph (A) or maintained by the taxpayer in the case described in subparagraph (B) is inconsistent with the erroneous inclusion, exclusion, omission, allowance, disallowance, recognition, or nonrecognition, as the case may be.

* * * * *

SEC. 1312. CIRCUMSTANCES OF ADJUSTMENT.

The circumstances under which the adjustment provided in section 1311 is authorized are as follows:

(1) *Double inclusion of an item of gross income.*—The determination requires the inclusion in gross income of an item which was erroneously included in the gross income of the taxpayer for another taxable year or in the gross income of a related taxpayer.

(2) *Double allowance of a deduction or credit.*—The determination allows a deduction or credit which was erroneously allowed to the taxpayer for another taxable year or to a related taxpayer.

(3) *Double inclusion of an item of gross income.*—

(A) *Items included in income.*—The determination requires the exclusion from gross income of an item included in a return filed by the taxpayer or with respect to which tax was paid and which was erroneously excluded or omitted from the gross income of the taxpayer for another taxable year, or from the gross income of a related taxpayer; or

(B) *Items not included in income.*—The determination requires the exclusion from gross income of an item not included in a return the tax was not paid but which is includible in the gross income of the taxpayer for another taxable year or in the gross income of a related taxpayer.

(4) *Double disallowance of a deduction or credit.*—The determination disallows a deduction or credit which should have been allowed to, but was not allowed to, the taxpayer for another taxable year, or to a related taxpayer.

(5) *Correlative deduction and inclusions for trusts or estates and legatees, beneficiaries, or heirs.*—The determination allows or disallows any of the additional deductions allowable in computing the taxable income of estates or trusts, or requires or denies any of the inclusions in the computation of taxable income of beneficiaries, heirs, or legatees, specified in subparts A to E, inclusive (secs. 641

and following, relating to estates, trusts, and beneficiaries) of part I of subchapter J of this chapter, or corresponding provisions of prior internal revenue laws, and the correlative inclusion or deduction, as the case may be, has been erroneously excluded, omitted, or included, or disallowed, omitted, or allowed, as the case may be, in respect of the related taxpayer.

(6) [as added by Sec. 56(a), Technical Amendments Act of 1958, P. L. 85-866, 72 Stat. 1606, effective for determination (as defined in Sec. 1313(a)) made after November 14, 1954]. *Correlative deductions and credits for certain related corporations.*—The determination allows or disallows a deduction (including a credit) in computing the taxable income (or, as the case may be, net income, normal tax net income, or surtax net income) of a corporation, and a correlative deduction or credit has been erroneously allowed, omitted, or disallowed, as the case may be, in respect of a related taxpayer described in section 1313(c)(7).

(7) [as renumbered by Sec. 59(a), Technical Amendments Act of 1958, *supra*]. *Basis of property after erroneous treatment of a prior transaction.*—

(A) *General Rule.*—The determination determines the basis of property, and in respect of any transaction on which such basis depends, or in respect of any transaction which was erroneously treated, as affecting such basis, there occurred, with respect to a taxpayer described in subparagraph (B) of this paragraph, any of the errors described in subparagraph (C) of this paragraph.

(B) *Taxpayers with respect to whom the erroneous treatment occurred.*—The taxpayer with respect to whom the erroneous treatment occurred must be—

(i) the taxpayer with respect to whom the determination is made,

(ii) a taxpayer who acquired title to the property in the transaction and from whom, mediately or immediately, the taxpayer with

respect to whom the determination is made derived title, or

(iii) a taxpayer who had title to the property at the time of the transaction and from whom, mediately or immediately, the taxpayer with respect to whom the determination is made derived title, if the basis of the property in the hands of the taxpayer with respect to whom the determination is made is determined under section 1015(a) (relating to the basis of a property acquired by gift).

(C) *Prior erroneous treatment.*—With respect to a taxpayer described in subparagraph (B) of this paragraph —

(i) there was an erroneous inclusion in, or omission from, gross income,

(ii) there was an erroneous recognition, or nonrecognition, of gain or loss, or

(iii) there was an erroneous deduction of an item properly chargeable to capital account or an erroneous charge to capital account of an item properly deductible.

SEC. 1313. DEFINITIONS.

(a) *Determination.*—For purposes of this part, the term "determination" means—

* * * * *

(3) a final disposition by the Secretary or his delegate of a claim for refund. For purposes of this part, a claim for refund shall be deemed finally disposed of by the Secretary or his delegate—

(A) as to items with respect to which the claim was allowed, on the date of allowance of refund or credit or on the date of mailing notice of disallowance (by reason of off-setting items) of the claim for refund, and

* * * * *

(c) *Related Taxpayer.*—For purposes of this part, the term "related taxpayer" means a taxpayer who, with the taxpayer with respect to whom a determination is made, stood, in the taxable year with respect to which the erroneous inclusion, omission, allowance, or disallowance was made, in one of the following relationships:

(1) husband and wife,

(2) grantor and fiduciary,

(3) grantor and beneficiary,

(4) fiduciary and beneficiary, legatee, or heir,

(5) decedent and decedent's estate,

(6) partner, or

(7) member of an affiliated group of corporations (as defined in section 1504).

SEC. 6511 [as amended by Sec. 82(a), Technical Amendments Act of 1958, *supra*, effective for taxable years ending after December 31, 1953, and ending after August 16, 1954]. LIMITATIONS ON CREDIT OR REFUND.

(a) *Period of Limitation on Filing Claim.*—Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. Claim for credit or refund of an overpayment of any tax imposed by this title which is required to be paid by means of a stamp shall be filed by the taxpayer within 3 years from the time the tax was paid.

(b) *Limitation on Allowance of Credits and Refunds.*—

(1) *Filing of claim within prescribed period.*—No credit or refund shall be allowed or made after the expiration of the period of limitation prescribed in subsection (a) for the filing of a claim for credit or refund, unless a claim for credit or refund is filed by the taxpayer within such period.

APPENDIX B.

IN THE UNITED STATES COURT OF CLAIMS

No. 233-64	MURIEL R. GERNAND	
No. 258-71	D. D. I., INC., et al.	
No. 281-70	CLIFTON L. BRIGHAM, et al.	*vs.*
282-70	JEROME G. GAGE, et al.	The
283-70	RALPH H. GAGE, et al.	United States
284-70	CHARLES F. JARRARD, et al.	

Before COWEN, *Chief Judge*, LARAMORE, *Sr. Judge*, DAVIS, SKELTON, NICHOLS, KASHIWA, KUNZIG and BENNETT, *Judges*, except that LARAMORE, *Sr. Judge*, participated only in No. 258-71, in which BENNETT, *Judge*, took no part.

ORDER.

These cases come before the court on motions for rehearing, reconsideration, amendment of judgments, new trials, and for further relief under Rules 151 and 152 of the Rules of this court and, on consideration thereof.

IT IS ORDERED this 16th day of March, 1973, that said motions be and the same are denied as follows:

No. 233-64 Muriel R. Gernand. Plaintiff's motion under Rule 151. Rehearings; amendment of judgments; new trials (filed February 7, 1973).

No. 258-71 D. D. I., Inc. et al. Plaintiffs' motion for rehearing (filed December 18, 1972).

No. 281-70 Clifton L. Brigham, et al.
282-70 Jerome G. Gage, et al.
283-70 Ralph H. Gage, et al.
284-70 Charles F. Jarrard, et al. Plaintiff's motion for rehearing or reconsideration pursuant to Rule 151 (filed January 15, 1973).

BY THE COURT
Chief Judge

APPENDIX C

In the United States Court of Claims

(Decided December 12, 1972)

No. 281–70

CLIFTON L. BRIGHAM AND JANE G. BRIGHAM v. THE UNITED STATES

No. 282–70

JEROME D. GAGE AND SHIRLEY K. GAGE v. THE UNITED STATES

No. 283–70

RALPH H. GAGE, INDIVIDUALLY, AND RALPH H. GAGE AND JEROME D. GAGE, EXECUTORS OF THE ESTATE OF NELL D. GAGE v. THE UNITED STATES

No. 284–70

CHARLES F. JARRARD AND MARGARET B. JARRARD v. THE UNITED STATES

Donald D. Statland for plaintiffs; *Burton W. Kanter*, attorney of record. *Calvin Eisenberg* and *Richard M. Kates*, of counsel.

John E. Evans, with whom was *Assistant Attorney General Scott P. Crampton*, for defendant. *Philip R. Miller*, of counsel.

Before COWEN, *Chief Judge*, DAVIS, SKELTON, NICHOLS, KASHIWA, KUNZIG, and BENNETT, *Judges*.

ON DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

KASHIWA, *Judge*, delivered the opinion of the court:

The four suits listed above were consolidated by an order

of this court. The suits were brought to recover income taxes and assessed interest for the years and amounts indicated,[1] plus interest as provided by law. The defendant has moved for judgment on the pleadings. The plaintiffs oppose the motion, raising three separate and distinct issues for our resolution:

(1) Whether the provisions of sections 1311 to 1315 of the Internal Revenue Code of 1954 apply in mitigation of the otherwise applicable statute of limitations on refunds with respect to the taxable years in issue.

(2) Whether, assuming the provisions of the mitigation sections are inapplicable, the taxpayers are entitled to recovery under the doctrine of equitable recoupment.

(3) Whether the examination of certain of the taxpayers' returns for the year 1962 constituted informal claims for refund timely filed on behalf of all the taxpayers for the years 1958 through 1961.

We hold for the defendant in each of the cases for the reasons hereinafter stated.

In 1952 the shareholders of Gage Structural Steel Corporation ("Gage") and Midland Structural Steel Corporation entered into an agreement to sell their shares of stock to Illinois Wesleyan University ("University") on an installment sale basis. All the plaintiffs in this consolidated action were included in this group of shareholders. In 1957 there

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[1] *No. 281-70: Clifton L. and Jane G. Brigham*

1958:	$1,304.63
1959:	2,424.63
1960:	629.43
1961:	2,008.19

No. 282-70: Jerome D. and Shirley K. Gage

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No. 283-70: Ralph H. and Nell D. Gage

1958:	$38,150.57
1959:	62,917.55
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No. 284-70: Charles F. and Margaret B. Jarrard

1958:	$34,847.26
1959:	65,547.28
1960:	8,323.08
1961:	18,536.45

was a repurchase by the group of shareholders of the stock sold in 1952.

The taxpayers filed federal income tax returns for the calendar years 1958 through 1961 with the District Director of Internal Revenue in Chicago, Illinois. On those returns the taxpayers reported gains from the sales of Gage stock as capital gains. Each of the plaintiffs' tax returns for the years 1958 through 1961 were subsequently examined. The amounts treated by the plaintiffs as capital gains installment sale proceeds were reclassified as ordinary income. The resulting taxes and interest were paid during the period March 1, 1963, to June 4, 1963.

An Internal Revenue agent during the years 1965 and 1966 examined the 1962 federal income tax return of Jerome D. and Shirley K. Gage, two of the taxpayers, and again made the finding that the proceeds from their sale of Gage stock constituted ordinary income. These taxpayers filed a protest to that finding and, for reasons discussed below, received a refund of $941.96. The Commissioner conceded that the proceeds of the installment sale received during 1962 were to be treated as capital gain and not ordinary income.

At approximately the same time, the 1962 federal income tax return of Ralph H. and Nell D. Gage was also examined. Again, the finding was initially made that the proceeds from the sale of their Gage stock constituted ordinary income. After the taxpayers filed a protest to this finding, the Internal Revenue Service informed the taxpayers, by letter of June 27, 1967, that no deficiency would be asserted for the year 1962. The Internal Revenue Service, as in the case of the 1962 year of Jerome and Shirley Gage, had reversed its stance and now conceded that a legitimate sale had occurred and that the proceeds of the sale of the Gage stock were subject to capital gain treatment. The reason for this changed stance by the Internal Revenue Service is clear.

In April, 1965, the United States Supreme Court decided the case of *Commissioner of Internal Revenue* v. *Brown*, 380 U.S. 563 (1965), which approved a transaction similar in nature to that involved in the instant case. In light of the *Brown* opinion, the Commissioner of Internal Revenue pub-

lished Rev. Rul. 66–153, 1966–1 CUM. BULL. 187.[2] There is no real doubt that the aboutface by the Internal Revenue Service with respect to the 1962 taxable year of Jerome and Shirley Gage and Ralph and Nell Gage was the consequence of the *Brown* decision as interpreted by the Revenue Ruling. Since it was the view of the Service that the *Brown* case was only applicable to cases in which the amount payable by the exempt foundation for the stock of the business is in accord with the fair market value of that stock, we are safe to assume that this was the situation with respect to the 1952 sale.

On June 17, 1968, within one year after the refund was granted to Jerome and Shirley Gage (and within one year after the above-described letter was sent to Ralph and the Estate of Nell Gage), all four groups of taxpayers filed claims for refund for the years 1958, 1959, 1960, and 1961 to recover the amounts of additional taxes and interest which they had paid. All of these claims were based on the treatment of the monies the taxpayers had received from their sales of Gage stock. All the claims were disallowed. The claims of Clifton L. and Jane G. Brigham were disallowed on December 9, 1968; and the claims of all the other taxpayers were disallowed on August 19, 1968. The taxpayers assert that they are entitled to recover the amounts which are specified in the aforementioned claims for refund, together with interest thereon, based upon the correct tax treatment of the Gage stock sale proceeds for the taxable years 1958 through 1961.

1. *Statutory Mitigation of the Statute of Limitations, Sections 1311 through 1315 of the Internal Revenue Code of 1954.*[3]

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[2] Based on Technical Information Release 768, Int. Rev. Serv. T.I.R. No. 768 (October 5, 1965).

[3] The pertinent portions of these sections provide as follows:

§ 1311. Correction of error.

(a) General rule.—If a determination (as defined in section 1313) is described in one or more of the paragraphs of section 1312 and, on the date of the determination, correction of the effect of the error referred to in the applicable paragraph of section 1312 is prevented by the operation of any law or rule of law, other than this part and other than section 7122 (relating to compromises), then the effect of the error shall be corrected by an adjustment made in the amount and in the manner specified in section 1314.

(b) Conditions necessary for adjustment.—

(1) Maintenance of an inconsistent position.—• • • an adjustment shall be made under this part only if—

Plaintiffs' chief argument is that the Internal Revenue Service's action with respect to certain of the taxpayers' income taxes for the taxable year 1962 were inconsistent determinations within the meaning of section 1313(a). These inconsistent determinations entitle each of the four groups of plaintiffs to reopen years otherwise barred by the relevant statutory period of limitations contained in section 6511.

Sections 1311 through 1315, commonly referred to as the "mitigation sections," require the following:

1) a determination
2) which adopts a position maintained by (in this case) the Commissioner (In the present case, since the Commissioner is the beneficiary of the statutory bar, it is his maintenance of the inconsistent position which must be shown. Section 1311(b)(1)(A) above quoted.);
3) and that position is inconsistent with the prior treatment of the item in question;
4) which brings about an unfair result described in one of the paragraphs of section 1312.

A. *Jerome D. Gage and Shirley K. Gage* (No. 282-70)

The parties have assumed that the following prerequisites to relief under the mitigation provisions have been fulfilled: (1) a "determination" within the meaning of section 1313 has been made; (2) the position adopted by the determination is inconsistent with the erroneous tax treatment of the

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(A) in case the amount of the adjustment would be credited or refunded * * *, there is adopted in the determination a position maintained by the Secretary or his delegate, * * *

and the position maintained by the Secretary or his delegate * * * is inconsistent with the erroneous inclusion, exclusion, omission, allowance, disallowance, recognition, or nonrecognition, as the case may be.

* * * * *

§ 1312. Circumstances of adjustment.

The circumstances under which the adjustment provided in section 1311 is authorized are as follows:

* * * * *

(7) Basis of property after erroneous treatment of a prior transaction.—

* * * * *

§ 1313. Definitions.

(a) Determination.—For purposes of this part, the term "determination" means—

* * * * *

(3) a final disposition by the Secretary or his delegate of a claim for refund. * * *

transaction in a previous taxable year; and (3) the determination is described in section 1312(7) of the Internal Revenue Code of 1954.

The crucial issue is whether the Commissioner of Internal Revenue has *actively maintained* a position with regard to the 1962 determination which is inconsistent with the erroneous inclusion or recognition. The requirement of the *maintenance* of the inconsistent position is basic to the existence of the statutory mitigation provisions. The legislative history of the predecessor section to section 1311 is unambiguous:

> (1) To preserve unimpaired the essential function of the statute of limitations, corrective adjustments should (a) never modify the application of the statute except when the party or parties in whose favor it applies shall have justified such modification by active inconsistency * * *. [S. REP. NO. 1567, 75th Cong., 3d SESS. 49 (1938).]

Since the Commissioner, in the instant case, is the beneficiary of the statute of limitations, it is his maintenance of the inconsistent position which must be shown. Otherwise, the mitigation provisions will not permit the taxpayers to "awaken the sleeping dog." Maguire, Surrey, and Traynor, *Section 820 of the Revenue Act of 1938*, 48 YALE L. J. 719, 735 (1939).

Our decision in *Heineman* v. *United States*, 183 Ct. Cl. 17, 391 F. 2d 648 (1968), controls the instant case. In *Heineman*, the taxpayer's decedent had viewed, for the years 1944 through 1946 and 1948 through 1952, the cash distributions made with respect to his common stock as nontaxable distributions in liquidation. Upon audit, it was determined that the distributions were in fact dividends. Deficiencies and interest were accordingly assessed and paid. Subsequently, the case of *Maguire* v. *Commissioner of Internal Revenue*, 222 F. 2d 472 (7th Cir. 1955), was decided, which held that the same company was, in fact, in partial liquidation. The distributions, therefore, were not subject to ordinary income tax. Although the Commissioner allowed the decedent Heineman a refund for 1954, the claims for the years enumerated above were denied by virtue of the statute of limi-

tations, the predecessor of section 6511(a) of the Internal Revenue Code of 1954. In response to the plaintiffs' argument that the Commissioner's allowance of the 1954 refund claim constituted the maintenance by the Commissioner of a position inconsistent with the position taken in prior years with respect to the distributions of the corporation, this court held:

> * * * This contention misconstrues the nature of the inconsistent position requirement of Section 1311(b)(1). One does not "maintain" a position, in the ordinary sense of that phrase, merely by accepting a contention or position originated and actively asserted by an opposing party. In order for Section 1311(b)(1) to apply, defendant, as the party relying upon the bar of the statute of limitations, must be the *active* party in maintaining the position, not merely a passive party acceding to a position actively maintained by taxpayers. * * *
>
> * * * * *
>
> This interpretation of the inconsistent position requirement is in full accord with the recognized purpose of the mitigation provisions. The Senate Report amply demonstrates that the mitigation provisions were enacted primarly to prevent either the Commissioner or the taxpayer from gaining the advantage of double taxation or double tax avoidance by the offensive use of the statute of limitations. * * * [183 Ct. Cl. 22, 23–24, 391 F. 2d 651–652.]

The plaintiffs argue that the factual pattern in their cases is more nearly the equivalent of *Moultrie Cotton Mills* v. *United States*, 138 Ct. Cl. 208, 151 F. Supp. 482 (1957). In *Moultrie*, the taxpayer was required by Treasury Department regulation to recompute its inventories for the years 1941 through 1947. This was the result of a change in inventory method for a later year. The result of this computation was that, aside from the statute of limitations, there would be a deficiency adjustment for 1947 and overpayments for 1941 through 1946. The Commissioner relied on the statute of limitations in his refusal to refund the overpayments for 1941, 1942, and 1944.[4] In refusing to acknowledge the applicability of the predecessor sections to sections 1311 through

[4] 1943 was open due to the filing of consents.

1315, the Commissioner contended, *inter alia*, that there had been no inconsistent position maintained by the Commissioner. But the court disagreed and held that:

> * * * the allowance in 1954 of plaintiff's claims for refund for 1943, 1945 and 1946, based on the *required* inventory recomputation, is a determination by the Commissioner inconsistent with the prior (1953) denial of plaintiff's claims for refund for the years 1941, 1942 and 1944 which were based on the same *required* recomputation. [138 Ct. Cl. 214, 151 F. Supp. 485.] [Emphasis added.]

The current view of the *Moultrie* decision was expressed by this court in the *Heineman* case, where, in distinguishing *Moultrie*, we said:

> Despite the broad language used in *Moultrie*, that case is distinguishable on its facts and should be limited to its facts. For, in *Moultrie*, it was the *Government's own regulations* which required the taxpayer to go back and recompute its inventories for the years 1941 through 1947. * * * Thus, *Moultrie* stands for the proposition that allowance of a refund in open years is a position maintained by the Commissioner inconsistent with the refusal to allow a refund for closed years only in the narrow type of situation existing in that case. Obviously, no such situation exists in the instant case. [183 Ct. Cl. 26, 391 F. 2d 653.]

It remains for the plaintiffs to establish that Revenue Ruling 66–153 is analogous to the Treasury Regulation in *Moultrie*. This plaintiffs are unable to do. The Revenue Ruling was, in effect, an acquiescence with the *Brown* decision of the United States Supreme Court. At the very most, the Ruling was an attempt by the Internal Revenue Service to interpret that decision in the most limited way, i.e., as applying only to sales of stock at fair market value. The crucial point is that this Ruling did not *require* any activity. The function of the ruling was acquiescence, not command. Plaintiffs are in the identical position of the plaintiff in the *Heineman* case: Upon hearing of a favorable court decision, applications for refund were made. The Commissioner has not attempted to exploit the statute of limitations by adopting an inconsistent stance for an open year. The Commissioner, to

the contrary, has merely acceded to the plaintiffs' demand for the open year.

Both the taxpayers and the Government neglected to mention two Fifth Circuit cases until oral argument. Both *United States* v. *Rachal*, 312 F. 2d 376 (1962) and *Gant* v. *United States*, 441 F. 2d 1130 (1971), were decided for the taxpayers. But these cases are distinguishable. In the factual pattern before us, adjustments for one year do not have a consequential effect on other years, as is the case with inventory adjustments or fiscal year adjustments.[5] The situation before us is as in *Heineman*. After a change in the interpretation of the law, the taxpayers are attempting to reopen closed years, asserting that the distributions for those closed years were taxed under an incorrect rate structure.

B. *Ralph H. Gage and Estate of Nell D. Gage* (No. 283–70)

Plaintiffs' petition did not allege that an audit took place with regard to this set of taxpayers nor did the petition allege that the Internal Revenue Service had written the taxpayers that no deficiency would be asserted. On oral argument before this court, counsel for the Government conceded, for purposes of its motion, that a determination was made with respect to these taxpayers. The Government's argument is thus the same argument made with respect to Jerome D. and Shirley K. Gage: That there has been no maintenance of an inconsistent position by the Commissioner of Internal Revenue. For the reasons previously stated, we agree with the Government.

C. *Clifton L. Brigham and Jane G. Brigham*[6] (No. 281–70); and D. *Charles F. Jarrard and Margaret B. Jarrard* (No. 284–70)

The case for statutory mitigation for these two sets of taxpayers is even weaker. Although the case may be disposed of

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[5] But see *Glatt* v. *United States*, No. 149–68, decided this day, for a decision that not all cases dealing with inventory adjustments are subject to the mitigation provisions of sections 1311 through 1315. Inventory cases are also subject to the prerequisite that the party relying on the statute of limitations must be the one who has maintained the inconsistent position. With respect to this prerequisite, our decision in *Glatt* distinguishes *Rachal* and does not follow *Gant*.

[6] Although these plaintiffs' names are spelled "Bringham" in their original petition, this was evidently a misprint.

on the ground that the Commissioner of Internal Revenue has not maintained an inconsistent position, these plaintiffs have, in addition, failed to satisfy the requirement that a determination be made with respect to them or a related party.

It is clear that a direct determination has not been made with respect to the Brighams or the Jarrards. To remedy this situation, the taxpayers first argue that they are related taxpayers within the meaning of section 1313(c)(6), i.e., that they as well as the Gages were all "partners"[7] in the joint venture of selling the Gage stock to the University.

Since the parties have agreed, for purposes of this motion, that section 1312(7) provides the only possible circumstance of adjustment, we need not reach the question of whether a partnership exists among the four groups of taxpayers. Section 1312(7) provides, in effect, its own definition of "related taxpayers" and does not incorporate into its definition the various relationships specified in section 1313(c).[8]

The Brighams and the Jarrards simply do not satisfy the clear language of either section 1312(7)(B) (ii) or (iii):

> (ii) a taxpayer who acquired title to the property in the transaction and from whom, mediately or immediately, the taxpayer with respect to whom the determination is made derived title, or
>
> (iii) a taxpayer who had title to the property at the time of the transaction and from whom, mediately or immediately, the taxpayer with respect to whom the determination is made derived title, if the basis of the property in the hands of the taxpayer with respect to whom the determination is made is determined under section 1015(a) (relating to the basis of property acquired by gift).

It is simply not the case that the Gages (with respect to whom a determination was made) in any way derived title from or through the Brighams or the Jarrards.

2. *Equitable Recoupment*

The four groups of taxpayers contend that if the mitigation provisions do not provide relief, then they may avail themselves of the judicial doctrine of equitable recoupment.

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[7] Shareholders are not listed in § 1313(c) as "related parties."

[8] Treas. Reg. § 1.1313(c)-1 (1972).

As stated above, the Government, for purposes of this motion, has not contested plaintiffs' assertion in the various petitions that the circumstance of adjustment is a basis adjustment under section 1312(7).[9] The plaintiffs' failure to prevail under the mitigation provisions is thus not traceable to any failure in establishing that they are within a category of adjustment. Rather, the Government has established that the Commissioner of Internal Revenue did not maintain an inconsistent position.

This court has held that within the defined areas to which the mitigation provisions are addressed, i.e., 1312(1) through 1312(7), the statutory remedy is exclusive:

> * * * When Congress established the detailed provisions of the mitigation sections it intended, we think, that they supersede any common-law recoupment remedies with respect to the categories designated in section 1312 * * *. [*Gooding* v. *United States*, 164 Ct. Cl. 210, 326 F. 2d 995–996.][10]

Even assuming that the taxpayers were not within the literal language of section 1312(7), the plaintiffs still misapprehend the historical function of the recoupment remedy in the tax law. When its benefits are sought by the taxpayer, the function of the doctrine is to allow the taxpayer to *reduce* the amount of a deficiency recoverable by the Government by the amount of an otherwise barred overpayment of the taxpayer. In *Bull* v. *United States*, 295 U.S. 247 (1935), an executor's suit was founded on a timely claim for refund, paid pursuant to the Government's asserted deficiency, on the theory that the tax should be reduced by an earlier overpayment, recovery of which was barred by the statute of limitations. Here no such situation exists. The taxpayers are not seeking to reduce deficiencies in later years. The Government concedes that no such deficiencies exist. Rather, the plaintiffs are attempting an extension of the doctrine of equitable recoupment to the case of a refund of taxes for an otherwise barred year.

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[9] Evidently plaintiffs proceed on the assumption that the determination with respect to the Gages "implicitly" determined basis. See *Gooding* v. *United States*, 164 Ct. Cl. 197, 326 F. 2d 988, *cert. denied* 379 U.S. 834 (1964). Since the issue of the applicability of section 1312(7) was not contested by the Government, we express no opinion, but treat the determination as within the category described in section 1312(7).

[10] See also *Benenson* v. *United States*, 385 F. 2d 26, 32 fn. 8 (2nd Cir. 1967).

In both the *Bull* case and *Stone* v. *White*, 301 U.S. 532 (1937),

> * * * The single transaction or taxable event had been subjected to two taxes on inconsistent legal theories, and what was mistakenly paid was recouped against what was correctly due. * * * [*Rothensies* v. *Electric Storage Battery Co.*, 329 U.S. 296, 300 (1946).]

Under the facts of the case before us, the plaintiffs have paid a tax under ordinary income rates on installments received in earlier years; then a tax under capital gains rates for installments received in later years. The Supreme Court in *Rothensies* v. *Electric Storage Battery Co.*, 329 U.S. 296, 300–303 (1946), declined to extend the doctrine:

> The Government has argued that allowance of the claim of recoupment involved here would expand the holding in the *Bull* case. The Circuit Court of Appeals agreed that in the *Bull* case "the main claim and recoupment claim were more closely connected than they are here." *Electric Storage Battery Co. v. Rothensies*, 152 F. 2d 521, 524. But the court nevertheless allowed the claim because it considered that this Court had introduced the doctrine of recoupment into tax law and that it was "based on concepts of fairness." 152 F. 2d 521, 524. It said it saw no reason for narrowly construing the requirement that both claims originate in the same transaction. We think this misapprehends the limitations on the doctrine of recoupment as applied to tax law and it leads us to state more fully reasons for declining to expand the doctrine beyond the facts of the cited cases.
>
> It probably would be all but intolerable, at least Congress has regarded it as ill-advised, to have an income tax system under which there never would come a day of final settlement and which required both the taxpayer and the Government to stand ready forever and a day to produce vouchers, prove events, establish values and recall details of all that goes into an income tax contest. Hence, a statute of limitation is an almost indispensable element of fairness as well as of practical administration of an income tax policy.
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> * * * * *
>
> * * * If there are to be exceptions to the statute of limitations, it is for Congress rather than for the courts to create and limit them.[11]

[11] See also *McEachern* v. *Rose*, 302 U.S. 56 (1937).

This court in *Ford* v. *United States*, 149 Ct. Cl. 558, 569, 276 F. 2d 17, 23 (1960), in following *Rothensies*, stated:

> * * * If the doctrine of recoupment were a flexible one, susceptible of expansion, it might well be applied in the instant case. But the teaching of *Rothensies* is that it is not a flexible doctrine, but a doctrine strictly limited, and limited for good reason.

This court has even more recently had occasion to re-examine its position. In *Arthur E. Evans Trust* v. *United States*, 199 Ct. Cl. ——, 462 F. 2d 521 (1972), we again declined to expand the doctrine beyond its original bounds.

3. *Informal Claims for Refund*

As stated above, the 1962 return of Jerome D. and Shirley K. Gage as well as the 1962 return of Ralph H. and Nell D. Gage were examined in 1965 and 1966. It is the position of the plaintiffs that inherent in the grant of a refund to Jerome and Shirley Gage and in the decision not to assert a deficiency against Ralph and Nell Gage is an acknowledgment of the existence of informal claims for refund by *all* the taxpayers for the years 1958 through 1961.[12]

Informal claims for refund have been recognized when, at a minimum, a showing has been made that the purposes of a formal claim for refund have been fulfilled. See *United States* v. *Kales*, 314 U.S. 186 (1941). In *Newton* v. *United States*, 143 Ct. Cl. 293, 300, 163 F. Supp. 614, 619 (1958), this court outlined the critical requirement for a valid informal claim for refund:

> * * * The basic underlying principle is the necessity to put the Commissioner on notice of what the taxpayer is claiming and that he is in fact making a claim for refund. * * *

[12] It is clear that the filing of an informal claim for refund would have to occur within two years from the time the tax was paid. Section 6511(a), I.R.C. of 1954. The payment dates for the 1958 through 1961 liabilities were as follows: No. 281–70: April 25, 1963 to May 25, 1963; No. 282–70: April 29, 1963; No. 283–70: March 1, 1963 and June 4, 1963; No. 284–70: March 1, 1963 and March 25, 1963. Thus, if the grant of a refund for 1962 to Jerome and Shirley Gage in 1966 or the letter to Ralph and the Estate of Nell Gage in 1967 informing them that no deficiency would be asserted for 1962 were to be deemed informal claims for refund, they would not be timely. Plaintiffs must therefore be contending that the events at the initiation of an audit for the taxable year 1962 in 1965 with regard to Jerome and Shirley Gage constituted an informal claim for refund. Since we hold against the plaintiffs, we need not reach the factual question whether the audit for 1962 was initiated within two years of the various payment dates.

Plaintiffs Jerome and Shirley Gage did not transmit any written document to the Internal Revenue Service protesting the taxes collected for the years 1958 through 1961. It certainly cannot be presumed that the Commissioner of Internal Revenue is on notice of the filing of informal claims for refund for prior years (the taxes and interest on which having been collected some two years before) merely by auditing a return for a later year involving the same issue. We do not state here the rule as to what will amount to a sufficient showing of an informal claim for refund. Each case will undoubtedly present its own curious blend of facts and circumstances. We do hold that, as a matter of law, the Commissioner cannot be deemed to have received an informal claim for refund for earlier years by the mere fact of auditing the taxpayers' return of a later year involving the same issue.[13]

The identical situation applies with respect to the audit of the 1962 return of Ralph H. and Nell D. Gage.[14] Insofar as Clifton L. and Jane G. Brigham as well as Charles F. and Margaret B. Jarrard are concerned, an even weaker case is presented. These taxpayers were not even audited for 1962. To argue, as do these particular plaintiffs, that informal claims for refund were filed on their behalf for the years 1958 through 1961 by virtue of the audit for the year 1962 of another shareholder in the Gage corporation leads us even further afield. Their cases being even more tenuous than that of Jerome and Shirley Gage, none of the other plaintiffs may prevail on the theory of informal claims for refund.

For the foregoing reasons, defendant's motion for judgment on the pleadings is granted and the petitions are dismissed.

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[13] See *American Radiator & Standard Sanitary Corp.* v. *United States*, 162 Ct. Cl. 106, 113–114, 318 F. 2d 915, 920 (1963), where we said:

"• • • Informal refund claims have long been held valid • • •. But they must have a written component (*Sicanoff Vegetable Oil Corp.* v. *United States*, 149 Ct. Cl. 278, 286, 181 F. Supp. 265 (1960); • • •), and should adequately apprise the Internal Revenue Service that a refund is sought and for certain years. • • • It is not enough that the Service have in its possession information from which it might deduce that the taxpayer is entitled to, or might desire, a refund; nor is it sufficient that a claim involving the same ground has been filed for another year or by a different taxpayer. *Rosengarten* v. *United States*, • • • [149 Ct. Cl. 287, 181 F. Supp. 275 (1960), *cert. denied*, 364 U.S. 822]."

[14] Petitioners' allegations are even more unclear with respect to when the audit for the 1962 years was commenced. Again, we do not need to reach this factual question.

U.S. GOVERNMENT PRINTING OFFICE: 1972

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1693

CLIFTON L. BRIGHAM AND JANE G. BRIGHAM, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. C) is reported at 470 F. 2d 571.

JURISDICTION

The judgment of the Court of Claims was entered on December 12, 1972. A timely motion for rehearing or reconsideration was denied on March 16, 1973. The petition for a writ of certiorari was filed on June 14, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTIONS PRESENTED

1. Whether the Commissioner's ultimate acceptance of petitioners' characterization of certain installment receipts as capital gains requires the reopening of

earlier years, now closed by the statute of limitations, for which similar receipts were treated as ordinary income.

2. Whether petitioners made valid timely claims for refund.

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of Sections 1311, 1312, 1313, and 6511 of the Internal Revenue Code of 1954, 26 U.S.C. 1311, 1312, 1313, and 6511, are set forth at Pet. App. A, 11-15.

STATEMENT

The petitioners filed federal income tax returns for calendar years 1958 through 1961, in which they reported gains from their dispositions of stock in the Gage Structural Steel Corporation as capital gains. (The disposition of stock took place in 1952, but petitioners received installment payments for the stock during each of the years in question.) Upon examining the returns, an Internal Revenue Service agent classified the payments as ordinary income and adjusted petitioners' tax liabilities accordingly. The petitioners paid the additional tax and interest without protest.[1]

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[1]The additional amounts paid were as follows:

Clifton L. and Jane G. Brigham:	
1958	$1,304.63
1959	2,424.63
1960	629.43
1961	2,008.19
Jerome D. and Shirley K. Gage:	
1958	$4,356.77
1959	6,974.58
1960	1,498.88
1961	3,276.33

Subsequently an Internal Revenue Service agent examined the 1962 federal income tax returns of Jerome D. and Shirley K. Gage and of Ralph H. and Nell D. Gage; again the proceeds from their dispositions of Gage stock were reclassified as ordinary income. Those petitioners formally protested this treatment and, following this Court's decision in *Commissioner* v. *Brown*, 380 U.S. 563, the Commissioner conceded that petitioners had properly treated their installment receipts during 1962 as capital gains.

Petitioners then filed claims for refund of the additional taxes and interest which they had paid for the years 1958 through 1961. The Commissioner disallowed these claims on the ground that, since they were filed more than two years after the payments were made and more than three years after the returns were filed, they were barred by the statute of limitations, Section 6511 of the Internal Revenue Code of 1954, 26 U.S.C. 6511.

In the court below, petitioners contended that, notwithstanding the statute of limitations, their taxable years 1958, 1959, 1960, and 1961 are open for refund claims under Sections 1311-1315 of the Internal Revenue Code that they alternatively are entitled to equitable recoupment of the additional taxes and in-

---

Ralph H. and Nell D. Gage:	
1958	$38,150.57
1959	62,917.55
1960	5,572.00
1961	19,932.62
Charles F. and Margaret B. Jarrard:	
1958	$34,847.26
1959	65,547.28
1960	8,323.08
1961	18,536.45

terest they had paid for those years, and that, in any event, the statute of limitations had not run because the protests filed by Jerome D. and Shirley K. Gage and by Ralph H. and Nell D. Gage for the taxable year 1962 constituted informal claims for refund for all petitioners for their taxable years 1958 through 1961. The Court of Claims sustained the Commissioner's determination, and petitioners renew all their contentions here.

ARGUMENT

1. The Court of Claims properly held that the Commissioner's ultimate acceptance of petitioners' characterization of their installment receipts as capital gains does not require the reopening of years now closed by the statute of limitations for which similar receipts were treated as ordinary income.

a. Insofar as is here relevant, Sections 1311 through 1315 permit the reopening of closed years only where a determination by the Commissioner affects the basis of property involved in prior transactions or results in the double inclusion of an item of gross income or the double disallowance of a deduction or credit. See Section 1312. Since the Commissioner's determinations with respect to petitioners' dispositions of stock did not affect the basis of the stock or result in a double inclusion or disallowance, petitioners did not meet the basic statutory requisites for the reopening of closed years.[2]

---

[2]The decision below turned on a different point, *i.e.*, that the Commissioner had not maintained inconsistent positions as is also required before the mitigation provisions become applicable. See Section 1311(b). Upon motion for judgment on the pleadings, the government did not contest petitioners' implicit assertion that the characterization of the gains as ordinary or capital affected the basis of their stock. It is clear, however, that the mere characterization of the gains would have no affect whatsoever on the petitioners' basis.

The cases petitioners cite as in conflict with the decision below all involved determinations affecting the basis of property or resulting in double inclusion of income or double disallowance of deductions; thus the differences in result to which petitioners point stem from the fact that the elementary requisites for the application of the mitigation provisions of Sections 1311 through 1315 were met in the other cases and not met here. The asserted conflict does not exist.

b. As the Court of Claims properly noted, "the function of the doctrine [of equitable recoupment] is to allow the taxpayer to *reduce* the amount of a deficiency recoverable by the Government by the amount of an otherwise barred overpayment of the taxpayer" (Pet. App. C, 11). No deficiency has been asserted against petitioners for any open years, so that, for the reasons stated in the opinion below (Pet. App. C, 11-13), there is no occasion for the application of that doctrine here.

2. We also rely upon the reasoning of the Court of Claims (Pet. App. C, 13-14) in urging that petitioners' alleged informal claims of refund did not fulfill the purposes of formal refund claims and therefore did not stop the running of the statute of limitations.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1973.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

PETITIONERS' REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION.

The United States contests a prerequisite of relief which it admitted had been met in the Court below. Respondent contests the requested Writ of Certiorari upon the ground that the mitigation provisions (Sections 1311 through 1315 of the Internal Revenue Code of 1954) are inapplicable to the instant case since the Commissioner's determination with respect to the Petitioner's disposition of stock does not ". . . affect the basis of the stock or result in a double inclusion or disallowance . . ." (Brief for the United States in Opposition, p. 4). Accordingly, it is now argued by Respondent that Petitioners have not met one of the statutory requisites for employing the mitigation provisions to rectify the Commissioner's error.

The United States recognizes that it admitted in the Court below that the prerequisite it now contests had been satisfied.

(See Brief for the United States in Opposition, p. 4, footnote 2, See also Pet. App. C pp. 5-6.) Based upon this admission, Respondent's Motion for Judgment on the Pleadings was granted on a completely different ground which conflicts with decisions of several Federal Circuit Courts of Appeal. (See cases cited in Petition, p. 6.) The United States avoidance of a discussion of the conflict existing as to the basis upon which the case was decided by the United States Court of Claims is a tacit admission that the conflict exists and must be resolved by this Court.[1]

Respectfully submitted,

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1. The ground upon which the United States now seeks to avoid the granting of the Petition for a Writ of Certiorari further supports the necessity for issuance of the Writ. The government admitted for purposes of its Motion for Judgment on the Pleadings in the United States Court of Claims "(4) That this is [sic] a duplication or similar result described in one of the paragraphs of Section 1312, correction of which was barred at the date of the determination." (Br. p. 7.)

Based upon this admission, the United States Court of Claims assumed for purposes of the Respondent's Motion for Judgment on the Pleading that all the prerequisites for the application of the mitigation statutes were present except that the Commissioner of Internal Revenue had maintained an inconsistent position. (Pet. App. C pp. 5-6.)

The government's admission before the United States Court of Claims dispelled any necessity for proof on the issue now raised by the Government. The admission below opened the way to the government's cavalier denial before this Court that the requirement had not been met. Only by the granting of this Petition will Petitioners be afforded an opportunity to prove the incorrectness of Respondent's improper denial.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1693

CLIFTON L. BRIGHAM AND JANE G. BRIGHAM, ET AL.

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

In our brief in opposition to the petition for a writ of certiorari, we pointed out that, for a reason not reached by the court below, petitioner's claim in this case has no merit. Petitioners in reply allege (Pet. Rep. Br. 1, 2, n. 1) that the argument advanced in our brief in opposition is foreclosed by a government concession in the court below. This supplemental memorandum is filed to answer that allegation.

Petitioners' suit for refund is barred by the ordinary statute of limitations for tax cases, Section 6511 of the Internal Revenue Code of 1954, 26 U.S.C. 6511, unless petitioners satisfy all the prerequisites of Sections 1311 and 1312 of the Code, which permit the reopening of otherwise closed tax years. As we showed in our opposition, Section 1312 permits such reopening only

where a determination by the Commissioner affects the basis of property involved in prior transactions or results in a double inclusion of an item of income or a double disallowance of a deduction or credit, and the Commissioner's determinations here had no such consequences.

Petitioners do not contend that they have in fact satisfied the requirements of Section 1312; they claim instead that the government conceded in the court below that the requirements of Section 1312 had been met. But the government made no such concession. It merely argued, for purposes of its motion for judgment on the pleadings, that, even "assum[ing] *arguendo* that [the] requirements [of Section 1312] have been met" (Gov. Br. at 7),[1] petitioners had in any event failed to satisfy the additional requirement under Section 1311 of showing that the Commissioner had maintained inconsistent positions with respect to the years in question.

The Court of Claims, without reaching the question under Section 1312, decided the case on the ground that the Commissioner had not maintained inconsistent positions. Nevertheless, the government's argument below did not foreclose its reliance—either in further proceedings, if any, before the Court of Claims, or in opposing certiorari—on petitioners' failure to meet the requirements of Section 1312.[2]

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[1] A copy of the government's brief in the Court of Claims has been lodged with the Clerk of this Court.

[2] Petitioners also contend (Pet. Rep. Br. 2) that our principal reliance on Section 1312 constitutes a tacit admission that the decision below conflicts with three cited cases. Of course, no such admission was intended; to the contrary, we believe those cases are distinguishable on their facts.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1973.

DOJ-1973-09

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IN THE

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OCTOBER TERM, 1972.

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vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

REPLY TO THE SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

REPLY TO THE SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES.

On or about September 17, 1973, the United States filed an unusual supplemental memorandum with this Court opposing the Petitioners' request for a Writ of Certiorari. The United States asserts that the concession it made in the United States Court of Claims for the purpose of obtaining the Judgment on the Pleadings sought by the United States does not preclude it from disregarding that concession for the purpose of avoiding this Court's grant of the Writ requested by Petitioners. We submit the position of the United States is erroneous.

Petitioners' suit for refund is barred by the ordinary Statute of Limitations set forth in Section 6511 of the Internal Revenue Code of 1954, 26 U. S. C. 6511. However, the United States admits in its supplemental memorandum (p. 1), that this

Statute of Limitations is inapplicable to a factual situation encompassed by the mitigation provisions of Sections 1311 through 1315 of the Internal Revenue Code of 1954.

Petitioners contend the facts of this case are within the ambit of these mitigation provisions. In the United States Court of Claims, the Government denied Petitioners' contention and moved for Judgment on the Pleadings. The United States conceded that all the prerequisites for the application of the mitigation provisions had been met with the sole exception that the Commissioner had not maintained inconsistent positions (Gov. Br. at p. 7).[1] Based upon its summary review of the facts as determined from the allegations contained in the pleadings, the United States Court of Claims determined that the Commissioner had not "maintained inconsistent positions" and granted Judgment on the Pleadings to the United States.

Petitioners contend that the decision of the Court of Claims is erroneous. It is contrary to the law as established by several prior decisions of the United States Circuit Courts of Appeal. Moreover, the Court prejudged the facts without affording the Petitioners adequate opportunity to present evidence with respect to the facts. A Writ of Certiorari has been applied for on this basis, in addition to other grounds not discussed in the Supplemental Memorandum filed by the United States. (See Petition for Writ of Certiorari to the United States Court of Claims, pp. 6-10.)

In opposing this Court's granting of a Writ of Certiorari, the United States now asserts that a concession it made before the

1. A copy of the Brief for the United States in Support of its Motion for Judgment on the Pleadings in the United States Court of Claims has been lodged with the Clerk of this Court by the United States. (See Supplemental Memorandum for the United States p. 2, n. 1.)

Court of Claims was permature. For the purpose of obtaining its Judgment on the Pleadings the United States admitted that the Commissioner's determination affected the basis of the property involved. (See Brief for the United States in Opposition, p. 4, footnote 2, See also Pet. App. C pp. 5-6.) Now, without the citation of any authority, the United States contends that its concession before the United States Court of Claims does no preclude the United States from raising this matter as an issue "in further proceedings if any, before the Court of Claims, or in opposing certiorari. . . ." (Supplemental Memorandum for the United States, p. 2.)

Petitioners respectfully submit that for purposes of upholding the propriety of the Judgment on the Pleadings awarded the United States, the United States may not raise an issue which it conceded in the course of obtaining that Judgment.[2]

Finally, the decision of the Court of Claims was based upon the sole ground that the Commissioner did not maintain an in-

2. Perhaps in further proceedings, after the denial of the Motion for Judgment on the Pleadings, the United States might disregard its admission.

Moreover, contrary to Respondent's observation (See Supplemental Memorandum for the United States, p. 2), the Court of Claims did reach this question but due to Respondent's concession, it assumed the prerequisite had been met (Pet. App. C. pp. 5-6). Accordingly, Petitioners have not had an opportunity to prove before the United States Court of Claims that the basis of property involved was affected. Nevertheless, the contention was made as a necessary incident of relief requested by Petitioner. Without such contention, there was no reason for the Government to state in its Brief, "assum[ing] arguendo, that [the] requirements [of Section 1312] have been met". (Brief for the United States in Support of its Motion for Judgment on the Pleadings, p. 7.)

Moreover, it is obvious the basis of the property is affected. The continued treatment of the receipts at issue as dividend income for the years 1958 through 1961, inclusive, precludes the treatment of these receipts as proceeds from the sale of stock, as these proceeds have been consistently treated by the Commissioner from 1952 to 1957 and since 1962. Accordingly, these payments may not be used to increase the basis of the stock for which they are payment. Thus, the provisions of Section 1312, in fact, are met.

consistent position. The United States continues in its failure to even discuss the reason the decision of the Court of Claims was not contrary to the law established by other Circuits. (See Pet. p. 6; *United States* v. *Rachal*, 312 F. 2d 376 (5th Cir., (1962); *Gant* v. *United States*, 441 F. 2d 1130 (5th Cir. 1971); *Oklahoma Gas and Electric* v. *United States*, 72-2 USTC ¶ 9638 (10th Cir., 1972).

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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